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NOV 19 1900
JAMES H. McKENNEY,
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No. 348.

Gen. No. 17833. Term No. 348

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1900.

THE FREEPORT WATER COMPANY, *Plaintiff in Error,* *vs.* *THE CITY OF FREEPORT,* *Defendant in Error.*	*Error to the Supreme Court of the State of Illinois*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

A. J. HOPKINS,
Attorney for ~~Plaintiff~~ Defendant in Error.

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STATEMENT.

The statement of the case for plaintiff in error made by counsel, to the extent set forth in their brief, is substantially correct. There are, however, some omissions of parts of the ordinances and pleadings that for a better understanding of the case should be sup-

plied as having a bearing upon the issues presented.

An important feature of Sec. 6 of the ordinances of the city of Freeport, passed June 6th, 1882, is omitted from the statement made regarding it in the brief. The section in full is as follows:

"The city of Freeport reserves to itself the right to acquire by purchase and become the sole owner of said water works, including all machinery, mains, pipes, buildings and peoperty thereto, appertaining at the expiration of thirty years from the first day of July, 1882, by giving at least six months official notice thereof to the owner or owners of said water works, upon paying therefor to the owners thereof the value of said property to be ascertained by appraisement as follows: Said city shall select one competent person, and the owner or owners of said water works shall select another, and the two persons so selected shall select a third, or, in case they cannot agree on such third person, a third person shall be appointed by the judge of the Circuit Court of the thirteenth judicial circuit of the state of Illinois, residing at that time furthest from said city of Freeport, and the three men so determined upon shall appraise the value of said property at its then cash value, which appraisement shall be binding upon both parties as to the value thereof, and said city shall have the right to purchase and become the absolute owner of said water works, and property at such appraised value and in case said city does not purchase and become the owner of said water works and property as aforesaid, at the expiration of thirty years from the first day of July, 1882, then all the rights and privileges in this ordinance granted to said Nathaniel Shelton or his assigns

shall be extended for a further period of 25 years, subject to the rights of the city to purchase as aforesaid, and subject to the same duties, liabilities, obligations and penalties as herein provided for." (Trans. Rec. page 9).

Defendant's first special plea, in addition to the statement made in said brief, alleges in substance that prior to the passage of the ordinance of February 10th, 1896, the City council of the City of Freeport appointed a committee of its members to confer with plaintiff in error with a view of fixing *reasonable, fair and just rates for water service*, and gave notice that existing rates were *unjust and unreasonable*, and that the city would no longer continue to pay the rates so fixed by the said original ordinance; that plaintiff in error refused to treat with said committee and did not reduce its rates so as to make them *just, reasonable and fair*, and that therefore the ordinance of February 10, 1896, was enacted, and that the rates therein fixed, both as to city and individuals, *were fair, just and reasonable.* (Trans. Rec. 23-24).

The second special plea avers, in substance, that the city of Freeport, on the 11th day of February, 1896, paid in full to plaintiff in error all rates and charges for water service, according to the ordinance of June 6th, 1882. That after the passage of the last mentioned ordinance, on to-wit, July 1st, 1891, by reason of then existing conditions in furnishing such water service, the rent, sales and charges in that ordinance became, and were, *unjust, unreasonable* and *oppressive*, to said city and its inhabitants, and so being *unjust and unreasonable* and so failing to agree with the plaintiff in

error as to *just, fair and reasonable* rates, said city enacted the said ordinance of February 11, 1896, and did in and by said ordinance adjust, fix and declare other just and reasonable rates for water service, and that the water rates, rents and charges therein fixed were and are *fair, just and reasonable.* (Trans. Rec. 25).

Three sections of the statutes of the State of Illinois, relating to water works, material to this controversy, are correctly set out in the brief for plaintiff in error (pp. 34-35). In connection therewith there should also be considered the amended statute of 1885 (Laws Ills., 1885, p. 64) which provides as follows: "That in all cities, incorporated towns and villages where water works have been or may hereafter be constructed by any person or incorporated company, the city, town or village authorities in such cities, incorporated towns and villages may contract with such person or incorporated company for a *supply of water for public use for a period not exceeding 30 years.*"

By the demurrer, put in by plaintiff in error, to the said special pleas, all the material facts set up in those pleas are admitted. Thus the controversy here is reduced to a legal one, depending upon what construction shall be put upon the provisions of the statute above referred to and the ordinances passed in pursuance thereof.

II

BRIEF OF THE ARGUMENT.

I

A

The fixing of water rates for the period of 30 years by the ordinance of June 6, 1882, was not a contract

with the city; nor was such ordinance binding upon it, as the corporate authorities had no lawful right to so bind the city for fixed water rates for the entire period. The act of June 6, 1891, is a valid exercise of legislative power, and the ordinance of the city of Freeport, passed February 10, 1896, in pursuance thereof, is valid and binding on plaintiff in error.

City of Danville vs Danville Water Co., 178 Ill., 299.

Rogers Park Water Co. vs Fergus, 178 Ill., 571.

Ill. Trust and Savings Bank vs Arkansas City Water Co., 67 Fed. Rep., 196.

E. St. Louis vs E. St. Louis Gas Co., 98 Ill, 415.

Shepherd vs Milwaukee Gas Co., 6 Wis., 539.

Williams vs Mutual Gas Co., 52 Mich., 499.

E. St. Louis Gas Co., vs Griswold, 47 Ill., (Appl) 411.

B

The several statutes of the state of Illinois herein considered, should be construed together and so reconciled, if in any way conflicting, as to deny municipalities the power to pass and enforce irrepealable ordinances, which tend to create monopoly and impose unnecessary burdens on their inhabitants.

Cooley Const. Lim. pp. 232-233.

Dillon on Municp. Corp., Secs. 91-443.

Chicago vs Rumpff, 45 Ill., 95.

People vs Chicago Gas T. Co., 130 Ill., 268.

Greenwood on Pub. Policy, 180, 643, 554.

C

1. It will not be presumed that the legislature, in granting powers to municipal corporations, intended to clothe them with power to create a monopoly, or to create exclusive or special privileges in favor of individuals or private corporations; nor to pass ordinances to subject the inhabitants thereof to needless, excessive and oppressive burdens.

Lombard vs Stearns, 4 Cush. 61.

Greenwood on Pub. Policy, p. 317.

Hangen vs Albina L. & W. Co. (Org.), 14 L. R. A., 424. (28 Pacf. R. 244.)

Shepherd vs Milwaukee Gas Co., 6 Wis. 539.

Williams vs Mutual Gas Co., 52 Mich. 499.

2. Any ambiguity or doubt arising out of the terms used by the legislature in conferring power, must be resolved in favor of the public. Every reasonable doubt of power is resolved against the grantee and the power denied. This is especially true as to grants and and franchises of special privileges.

Coosaw Min. Co. vs State, 144 U. S., 550.

Seeger vs Meuler, 133 Ill., 94.

People vs Chicago Gas T. Co., 130 Ill. 268.

Davenport vs Kleinschmidt, 13 Pacf. 249.

Slidell vs Grandjean, 111 U. S. 412.

Dillon Municp. Corp. Sec. 89.

3. While, as a proposition of law, the legislature can delegate certain powers to a municipality, yet as to any power the state itself cannot exercise, it cannot lawfully delegate to its agents.

Beach on Pub. Corp. Sec. 554.

Chicago vs Rumpff, 45 Ill. 90.

Zanom vs Mound City, 103 Ill. 546.

Cooley on Municp. Corp., 340.

D

It is within the power of courts to declare that a thing which is within the letter of a statute, is not governed by the statute, because not within its spirit, or the intention of its maker.

Rector of Trinity Church vs U. S., 143 U. S. 457.

U. S. vs Kirby, 7 Wall 482.

Rockland Water Co. vs Camden, 80 Me. 544.

E

1. If it can be maintained that a municipality in making a contract for supplying water, acts in a private capacity, as an individual and not as a sovereign, and that there are some rights under such contract which are beyond destruction by the legislature, yet as to others in the administration of such contracts, they are not beyond legislative authority and control,

Wagner vs City of Rock Island, 146 Ill., 139.

Ruggles vs People, 91 Ill., 256.

Rogers Park vs Fergus, 178 Ill., 571.

2. In contracting for a supply of water, a munici-

pality acts both in its capacity as a public corporation and also in an individual capacity. When acting in the former capacity the corporation is in the exercise of its police power.

Dill Muncp. Corp. Sec. 246.

Hawthorn vs People, 109 Ill., 302.

Olmstead vs Morris, 47 N. J. L., 333.

F

1. Corporations or individuals engaged in a business which affects the public, owe a duty to the public. Any unreasonable restrictions upon the performance of such duties are prejudicial to the public interest and in contravention of public policy.

Syracuse Water Co., vs City of Syracuse, 116 N. Y., 167.

Illinois T. S. Bank vs Arkansas Water Co., 67 Fed., 196.

City of Chicago vs Rumpff, 45 Ill., 90.

2. Supplying water to cities and villages is a business impressed with a public use. A business, so impressed, implies the right of the legislative authority, not only to fix maximum rates, but also to adjust and reduce such rates and charges.

Rogers Park Water Co. vs Fergus, 178 Ill. 571.

I. C. R. R. Co. vs People, 95 Ill. 313.

Rosehill Cemetery Co. vs Hopkinson, 114 Ill. 209.

G

1. There is much apparent conflict, in the numerously reported water works cases, regarding the powers and extent of the powers municipalities may exercise in establishing and fixing water rates. On principle, however, long time and irrevocable contracts for fixed rates and charges are condemned.

DesMoines vs Water Works Co. 95 Iowa, 357.

State vs Gas Co. 34 Ohio, St. 572.

Zanesville Gas Co. vs 47 Ohio, St. 1.

2. In a number of cases the courts have held that contracts for the supply of water or gas to a municipal corporation, at a fixed price, and for an unreasonable period of time, are invalid.

Trustees vs City of Jacksonville, 61 Ill. (Appl.) 199.

Spring Valley Water Works vs Schottler, 110 U. S. 347.

E. St. Louis vs E. St. Louis L. Co. 98 Ill. 415.

E. St. Louis vs E. St. Louis L. Co. 47 Ill. (Appl.) 411.

III

A

1. The ordinance of February 10, 1896, is not in violation of the provisions of Section 10 art. 1, of the constitution of the United States, as impairing the obligation of a contract.

N. Y. & N. E R. R. Co. vs Bristol, 151 U. S., 556.

Ford vs Chicago Milk Shippers' Assn., 155 Ill., 166.

Cooley on Const. Lm., pp. 437, 438.

City of Danville vs Danville Water Co., 178 Ill., 299.

2. The said amendatory ordinance of the city of Freeport, which is based upon the provision of the act of the legislature of June 6, 1891, does not tend to deprive the plaintiff in error of its property without due process of law. Nor is it unconstitutional.

Munn vs Illinois, 94 U. S. 113.

Budd vs N. York, 143 U. S. 517.

Hawthorn vs People, 109 Ill. 302.

Ruggles vs People, 91 Ill. 256.

Long Island Supply Co. vs City of Brooklyn, 166 U. S. 685.

3. The act itself provides a lawful tribunal for the protection of the property rights of the plaintiff in error, if unjustly assailed, or if attempted to be put in jeopardy.

Act June 6, 1891, Laws of Illinois, page 85.

C. B. & Q. R. R. Co. vs Jones, 149 Ill. 361.

Hawthorn vs People, 109 Ill. 302.

San Diego Land Co. vs National City, 174 U. S. 739.

4. All regulations of trade, with a view to the public interest may more or less impair the value of property, but they do not come within the constitutional inhibition, unless they virtually take away and de-

stroy those rights in which property consists. This destruction must be, for any substantial purpose, total.

Munn vs Illinois, 94 U. S. 113.

Hawthorn vs People, 109 Ill. on page 309.

B

Section 14, Art. 2, Constitution of Illinois of 1870, prohibits the irrevocable grant of special privileges and is a denial of the power to fix unalterable rates and charges for water to be furnished to municipalities and their inhabitants. So also does Section 9, Chap. 32 of the Act entitled Corporations.

People vs Chicago Gas Co. 130 Ill. 268.

City of Danville vs Danville Water Co. 178 Ill. 299.

C

The attempt by plaintiff in error to irrevocably establish a schedule of water rates and charges for the term of 30 years in pursuance of the said ordinance, is unauthorized by Section 1, Art. 10, Chap. 24, of the Revised Statutes, relating to corporations.

Freeport Water Co. vs City of Freeport, 186 Ill. 179.

City of Danville vs Danville Water Co., 178 Ill. 299.

The legislature may delegate powers to municipal corporations as a tribunal and agent of the law to fix reasonable rates and charges for a public service.

San Diego Light Co. vs City of San Diego, 50 Pacf. R. 633.

English vs New Haven & N. Co. 32 Connecticut 240.

C. B. & Q. R. R. Co. vs Jones, 149 Ill. 361.

San Diego L. & T. Co. vs National City, 174 U. S. 739.

III

ARGUMENT.

I

Any decision reached in this case must be based upon the statutes, the ordinances and the pleadings set out in the record, and these should be construed under the law and decisions of the courts applicable thereto.

The material facts as set up in the special pleas of the defendant in error, are admitted by the demurrer. The case should then proceed as conceding that the rates and charges fixed for water service by the ordinance of June 6, 1882, were at the date of the passage of the subsequent ordinance of February 10, 1896, *unreasonable, unjust, and oppressive*, and that the rates and charges as fixed and determined in and by the latter ordinance, are *fair, just and reasonable.*

The contention of plaintiff in error, however, is that, admitting such facts to be true, the defendant in error cannot, as a legal proposition, obtain any relief therefrom during the time fixed in the ordinance, viz., 30 years. In this investigation no case has been cited, nor none we think, can be found, where the same provisions contained in this ordinance have been before this or any other court for construction and determination.

The anomalous features of this ordinance, when considered together, and in support of its claimed infallibility to change or modification, are *sui generis.*

By section 1 it purports to grant to Nathan Shelton, or his assigns the *exclusive right and privilege*, for the term of 30 years from the first day of July, 1882, of supplying the city of Freeport and its citizens with water. The rights and liabilities provided for in this ordinance, by section 2 *are to continue for a period of 30 years, unless sooner extinguished by purchase as thereinafter provided.* By section 6, there is reserved the right to the city of Freeport to acquire by purchase and to become the owner of such water works and property, at the expiration of 30 years from the first day of July, 1882, ~~when~~ otherwise "all the rights and privileges in this ordinance granted to said Nathan Shelton, or his assigns, *shall be extended for a further period of 25 years, subject to the rights of the city to purchase as aforesaid, and subject to the same duties, liabilities, obligations and penalties as herein provided for.*" (Rec. p. 9).

By section 7, it is provided that as an annual rental for the first 100 fire hydrants there shall be paid by the city the sum of $100.00 each; for all hydrants over 100, and up to 150, an annual rental of $80.00 each; and for all hydrants above or over the last mentioned number, an annual rental of $50.00 each. Such rentals are to be paid semi-annually, and the rent therefore to commence when each hydrant is set for use, and the city notified thereof, and shall continue "during the full term specified in this ordinance, unless said city shall sooner become the owner of said water works as hereinbefore provided, in which event said rental shall

cease." Then follows section 10, fixing maximum rates to consumers. The rates so fixed, both for hydrant service and service to consumers as before stated, are confessed to have been *unfair*, *unjust and oppressive*, at the time of amending the original ordinance.

It may safely be asserted here that no case can be found where an ordinance, or a contract, if you please to call it such, for supplying a commodity for general use, and which is impressed with a public service, containing the exclusive, irrepealable, unalterable and monopolistic features sought by this ordinance to be imposed upon the city of Freeport and its inhabitants, has been upheld by any court of final resort.

The line of argument pursued in the brief for plaintiff in error will not be followed, because it is hoped that this argument may be thus much abridged. Nor is it the purpose here to cram this brief or argument with an avalanche of cited authorities, which, if not ignored by the court, would impose upon its members a useless burden. It is to be hoped therefore that the paucity of cases cited to sustain the positions here assumed by defendant in error, as also the brevity in argument, will not be construed as a confession on the part of counsel for defendant in error that the positions taken are doubtful or untenable.

A

Lying at the threshold of this discussion, and involving one of the vital points in the case, is the denial of plaintiff in error of the right of the legislature of the State of Illinois, or of the city authorities of the city of Freeport, to in any degree change, alter or impair any

of the express provisions of the ordinance of June 6, 1882.

It is here contended that this ordinance, regardless of said legislative act of July 1, 1891, is not a valid enactment, in so far as it attempts to create an exclusive privilege by fixing unalterable water rates and charges for the period of 30 years; and further, in so far as it extends and protects the monopoly thereof, by denying the right of the city to purchase the plant until the expiration of that time. In case the city should not be in a situation to purchase, such misfortune would subject the city and its inhabitants to the onerous burden of paying these unfair and unjust charges for water service *for the full period of another term of 25 years.*

It seems to be admitted in the brief for plaintiff in error that the ordinance of June 6, 1882, is invalid, to the extent of granting *an exclusive privilege* (page of argument 78), but it is contended that the defendant in error, having enjoyed the benefits derived from the water furnished, is liable therefor under a *quantum meruit.* But plaintiff in error in this action is seeking to recover the price mentioned in the so-called contract, and not for what the water furnished thereunder was reasonably worth. The point sought to be made by counsel is not very clear.

It is true that the legislature of the state of Illinois has, by statutes enacted, authorized cities and villages to provide for a supply of water. Soon after the adoption of the present constitution of said state, April 9th, 1872, an act was passed providing that when an incorporated company should construct water works, cities

or villages might contract with such incorporated company for a supply of water, for a period not exceeding 30 years. On April 10, 1872, at the same session of the legislature, the act was passed under which plaintiff in error claims to have contracted for the furnishing of water to the city of Freeport, which so-called contract is the vital controversy in this case.

B

It is a familiar rule in construing charters and grants of power to municipalities, and "the general disposition of the courts in this country has been, to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them, thus applying substantially the same rule that is applied to charters of private incorporations. The reasonable presumption is that the state has granted in clear and unmistakable terms all it has designed to grant." *Cooley on Const. Lim. page 232.* The same author says: "It must follow that, if in any case a party assumes to deal with a corporation, on the supposition that it possesses powers which it does not, or to contract in any other manner than is permitted by the charter, he will not be allowed, even though he may have complied with the undertaking on his part, to maintain a suit against the corporation based upon its unauthorized action."

"The extent of the power of municipalities, whether expressed, implied or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary, is that while the construction is to be just, seeking first of all

for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the state or general public, and against the grantee." *Dillon on Corp. Sec. 91.* The text of this author has been so frequently approved by the courts that no especial reference thereto is necessary.

If the contention for the plaintiff in error be conceded that the two provisions of the statute, passed at the session of the legislature of 1871, should be construed in *pari materia*, then, keeping in mind the above canon of construction, it will be seen that by the act of April 9, 1872, a general power is given to cities and villages of the state to contract with an incorporated company for a supply of water for public use for a period not exceeding 30 years. The act of April 10, 1872, article x, is a part of the general incorporation act relating to cities and villages, under the title of "Water Works," section 1 of which is claimed by plaintiff in error to authorize the ordinance granting the power to make the contract in controversy. The first mentioned act was amended, both in title and body, by an act in force July 1, 1885, which provides, section 1, "That in all cities, incorporated towns and villages where water works have been, or may hereafter be, constructed by any person or incorporated company, the city, town or village authorities in such cities, incorporated towns and villages, may contract with such persons or incorporated company for a supply of water for public use, for a period not exceeding 30 years."

Thus is plainly indicated the legislative intent and

meaning, in the passage of the act of April 10, 1872, to provide that 30 years was intended as the maximum term of the contract, but it does not indicate an intention to give the right to fix unalterable rates and charges for water furnished for that period.

The verbiage of section 1 of the act of April 10, 1882, is confusing and uncertain. It may, however, be fairly and reasonably construed in harmony with other legislation, and to express the evident legislative intent, to authorize any person or private corporation to construct and maintain water works for a period of 30 years, at such rates for water service as may be fixed by ordinance.

Counsel for plaintiff in error go into a philological discussion to give a construction to this section, but it seems that a fair and reasonable interpretation thereof, under the rules applied to legislative grants, is more practical and consistent.

C

1. It will be presumed that the legislature, in passing the act of April 10, 1882, was familiar with the extent of legislative power in such cases, and did not intend to enact a void law; that they were familiar with the rule of limitation, as stated by Mr. Dillon in his work on Municipal Corporations, sec. 97, that municiple corporations, as well as legislatures, "cannot make contracts which shall cede away, control or embarass their legislative powers."

2. The fact that the meaning of this section of the statute is in doubt and requires construction, amounts to a denial of the rights claimed under it by the plaintiff

in error, that municipal corporations are authorized by it to fix unalterable rates for water service for the period of 30 years.

3. But it is claimed by plaintiff in error that, independently of this statute, the city of Freeport, under a grant of general powers providing for the construction of water works, had the implied power to make a contract by ordinance like the one in question. This contention is denied by defendant in error for the reasons following: (1) If lawful, the power must be conferred by an express and unambiguous grant of the legislature. (2) The legislature had not power to make such a contract for itself, and any general grant made by it to a municipality would carry with it no implied authority to make the contract. (3) The ordinance or contract is an attempt to deprive the municipality of its sovereignty over a matter of public concern—a surrender of its governmental powers to a corporation and an abdication of its police power in a matter of public welfare, to the injury of its citizens.

The statute of June 1. 1891, is invoked to create a a special and exclusive privilege to collect fixed rates and charges, which are confessed on this record to be unjust, unfair and unreasonable, for the full term of 30 years, and if the corporation then becomes impoverished by these exorbitant charges, the monopoly is to be continued for another term of 25 years.

Before a doubtful statute, as the one in question is conceded to be, is held to grant a power so vicious to the public welfare, the reading of the statute ought to confer it by explicit and unambiguous words. In construing a con-

tract or ordinance of the town of New Lots, which authorized a water company to erect and maintain water works for supplying the town with water for the term of 25 years at a special rate for hydrants, it was claimed by the water company that its contract was inviolable and not subject to impairment by proceedings in condemnation. The court in *L. I. Water Co. vs City of Brooklyn, 166 U. S 685*, denied the claim and held that the contract or ordinance created no exclusive privilege. The Court say: "The contract in terms contains no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town, and contains a covenant on the part of the town to pay certain hydrant rental. *But grants from the public are strictly construed in favor of the public*, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege. [Then follows citations of authorities]. Nor is there anything in the act of annexation which made a contract or created a right beyond the power of the legislature to change. It gave the city the right to purchase or condemn at any time within two years, but this specifffcation of time did not operate to prevent the legislature from enlarging the time, or from granting, at any subsequent period during the life of the contract, a further right of purchase or condemnation. No consent was asked of the town company in the act of annexation; it entered into no new contract; nothing was done to enlarge the rights which it had against the public. The act was simply one of legislative discretion in respect to municipal organization, and, like any other such act, *subject to future modification by the legislature.*"

The plaintiff in error could not carry on the busi-

ness of supplying water without the franchise, and it will be held to the performance of such duties as are incident to the service it undertook for the public. That duty was supplying the city and its inhabitants with water on equal terms and at reasonable rates. Says Mr. Morwartz in his work on Private Corporations, Sec. 1129, "It may be laid down as a general rule that whenever the aid of the government is granted to a private company, in the form of a monopoly, or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made. * * * The same rule applies to companies invested with special privileges, at the expense of the public, for the purpose of supplying cities with water."

2. It is claimed, however, by plaintiff in error that aside from this ordinary rule regarding the duties of corporations, in dealing with the public, this corporation had the authority for the supposed contract by the statute of April 10, 1872, for fixing rates for water service during the full term of thirty years. This statute, in three cases hereinbefore, referred to, was before the Supreme Court of the state of Illinois, and it was held by that Court in these cases that the statute did not authorize the making of a contract for unalterable rates for long periods of time.

In the case of *City of Danville vs Danville Water Company, 178 Ill., on page 312*, the Court say: "The acts of April 9, 1872, and the city and village act of April 10, 1872, both passed at the same session of the

legislature, and relating to the same matter, so far as section 1 of article 10 above quoted is concerned, are in *pari materia* and should be construed together. (*South Park Comrs. vs First Nat. Bank of Chicago, 177 Ill, 234*). Said section 1 authorizes the city council to empower a private corporation to construct and maintain water works, at such rates as may be fixed by ordinance. The meaning of this language is, not that the water works are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding thirty years. The clause, "for a period not exceeding thirty years" qualifies the words, 'construct and maintain the same,' but does not qualify the words, 'at such rates as may be fixed by ordinance.' In other words, the city council may authorize a private corporation to construct and maintain water works for a period not exceeding thirty years, and they may authorize a private corporation to construct and maintain the water works at such rates as may from time to time be fixed by ordinance. The evident meaning of section 1 is, that there was to be reserved to the city council the power to fix the rates by ordinance at such figures as should be *fair and reasonable.* If the rates were to be fixed by ordinance, they could only be fixed by such ordinance, as was legal and whose passage was within the power of the council. A legislative body cannot part with its powers by any proceeding, so as not to be able to continue the exercise of such powers. It has no authority even by contract to control and embarrass its legislative powers and duties. (*Greenwood on Public Policy, p. 317; Cooley's Const. Lim. p. 206; 15 Am. & Eng. Ency. of Law, p. 1045; 1 Dillon on Mun. Corp. sec. 443*)

This construction of the statute is questioned by plaintiff in error. Its counsel then proceed to give a so-called "grammatical construction" of the act and mistakenly assume that counsel for defendant in error does not seriously deny their grammatical construction of the act. The need of a construction suggests a doubt as to its meaning. So the Illinois Supreme Court gave it a construction as shown in the opinions rendered, and this construction may be sustained both upon principle and authority.

The case of *Coosaw Min. Co. vs State, 144 U. S., 451*, is much in point here. There the contention was that a statute then under consideration might be susceptible of two constructions. The Court in the opinion say: "If the act of 1876 is fairly susceptible of the two constructions we have indicated, as we think it is, the interpretation must be adopted which is most favorable to the state. The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. (Citing a long line of cases). *Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by mere implication.*"

So in the case of *Slidell vs Grandjean, 111 U. S. 412*, the Court, in the opinion, say: "It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will

support the claim of the government rather than that of the individual. *Nothing can be inferred against the state.*"

These cases are supported by that of *Seeger vs Mueller, 133 Ill., 86.* "Municipal corporations have no powers which are not conferred on them in express terms, or by a fair implication. Any ambiguity or doubt arising out of the term used by the legislature in conferring their powers must be resolved in favor of the public. *A fair, reasonable doubt concerning the existence of a power is resolved against the corporation, and the power is denied.*"

3v. It will not be here disputed that the legislature can delegate its powers to a municipality. Yet it is contended that any power the state cannot exercise itself, cannot lawfully be delegated to its agents. The granting of special privileges and immunities is inhibited by the constitution of the State of Illinois. The legislature cannot confer upon municipal corporations power to barter away its governmental powers, nor can the state itself surrender certain of its governmental powers, especially its police power, to prevent the enforcement of a common law duty to regulate rates, tolls and charges by a corporation in the exercise of a public service. Ordinances made in pursuance of an attempt by the legislature to surrender or grant such powers to municipal corporations are invalid.

"All ordinances must be general in their character; must not be in violation of law, contrary to public policy, *or unnecessarily oppressive*, and must not unjustly, or arbitrarily, discriminate between citizens of the same

class." *Zanone vs Mound City, Supra.*

Mr. Cooley, in his work on Constitutional Law, page 340, says: "It has also been intimated in a very able opinion that the police power of the state could not be alienated, even by express grant. And this opinion is supported by those cases where it has been held that licenses to make use of property in certain modes may be revoked by the state, notwithstanding they may be connected with grants and based upon a consideration," and refers to *Thorpe vs R. & B. R. R. Co., 27 Vt. 140.*

Mr. Greenleaf in a note to his edition of Cruise on Real Property, Vol. 2d, page 67, says upon the subject of legislative powers, "They are entrusted to the legislature to be exercised, not to be bartered away; and it is indispensable that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature disabling itself from the future exercise of powers entrusted to it, for the public good, must be void, being in effect a covenant to desert its paramount duty to the whole people."

D

The rule that the word or the letter of a statute does not necessarily govern in its construction, should here be applied. A construction of the several statutes of the state of Illinois relating to water works, and to a supply of water thereby to cities and villages, seems plainly to show that the intent of the legislature was not to allow contracts to be made for fixed rates for water service for a term of 30 years.

Upon this question, as manifesting the legislative

intent, are numerous acts of the legislature of that state relating to the regulation and control of corporations in the performance of a public service. In harmony therewith numerous decisions are to be found in the reports of the courts of that state construing doubtful provisions of statutes which were claimed to confer corporate rights and privileges, in which it is declared that persons and corporations, in rendering a public service, cannot maintain fixed, exorbitant or unreasonable rates and charges, which are beyond legislative control. Thus these water works acts, as manifesting their spirit and the intention of the legislature in their enactment, should be considered in the light of this legislation, and of these decisions.

The rules of construction adopted by other courts in such cases, justify the conclusion reached in these cases by the Illinois courts.

In the case of *Rector of Trinity Church vs United States, 143 U. S., 457*, the Court say: "It is a familiar rule that a thing may be within the letter of the statute and not within the statute, because not within its spirit nor within the intention of its maker. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislature, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable

to believe that the legislator intended to include the particular act."

In *United States vs Kirby, 7 Wall. 482*, in construing a statute there in controversey, the Court say. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf that the Bolognian law which enacted 'that whoever drew blood in the street should be punished with the utmost severity,' did not extend to the surgeon who, opened the vein of a person that fell down in the street in a fit."

This rule is also pointedly and correctly stated in the case of *Rockland Water Company vs Camden Water Co., 80 Me. 544*, "That one who claims a franchise or exclusive right or privilege in derogation of the common right of the public, must prove his title thereto by a grant clearly and definitely expressed, and cannot enlarge it by equivocal or doubtful provisions or probable inferences. *Every reasonable doubt is to be resolved adversely.* Nothing is to be taken as conceded, but what is given in unmistakable terms, or by implication equally clear. *The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare.*" This branch of the case is now left for the consideration of the Court, upon

the suggestions and authority above mentioned.

E

1. It is said to be difficult to define with precision what limitation exists upon the power of the legislature over municipal corporations as ordinarily constituted. It is doubtless true they may make contracts which are beyond legislative destruction, yet the legislature may regulate or change the use of property which comes under the control of such corporation.

In the case of *City of Quincy vs Bull, 106 Ill. 337*, an ordinance of the city was under consideration, which was in the nature of a contract for supplying the city with water. It was held, that in so far as the ordinance provided for the use of the streets for laying pipes and for putting in of the water works, the city had power to make a binding contract with Price for that purpose. The question was further presented, whether so much of the ordinance as provided for the compensation which the city agreed to pay for the period of 30 years was valid and binding on the city. The Court in the opinion cautiously avoided the latter question, but intimated that the ordinance might be deemed invalid in that particular, but as there was no attempt at recovery from the city for the price of water on the basis of the contract rate, no opinion was expressed on that question.

It was held in the case of *Wagner vs City of Rock Island, 146 Ill. 139* that the city, in providing for a system of water works by procuring water from some permanent source of supply and distributing it by means of pipes laid in the streets, though not an exercise of the power of sovereignty, was undoubtedly a business,

private in its nature, and "belonged to that class of occupations or enterprises upon which a public interest was impressed."

In *Ruggles vs People, 91 Ill., 256*, the Court, in speaking of the charter of a company which was claimed to be a contract with the state for the fixing of rates and tolls, say: "But does this express grant change the power to control, or does it confer unlimited power, or is the grant made with implied limitation that in fixing their rates and tolls they shall be reasonable? The fact that the grant and the acceptance of the charter constitute a contract, does not solve the question; like any other contract it is subject to construction." This case was affirmed on writ of error to this Court. *Ruggles vs People, 108 U. S. 526.*

2. The city of Freeport, as an agent of the state in providing for a supply of water, was acting in its capacity as a public corporation, and in fixing rates and charges was exercising rights which appertained to its police powers.

"If the supplying a city or town with water is not a public purpose, it is difficult to conceive of any enterprise entrusted to a private corporation that could be classed under that head," said *Justice Van Syckle in Olmstead vs Morris Aqueduct Co., 47 N. J. L., 333.*

F

1. In view of what has been said and shown in the preceding part of this argument, it may be confidently claimed that the supplying of water to cities and villages by municipal corporations is a business impressed with a public use. Restrictions placed upon any

duty connected with such business, which are prejudicial to the public interests, are in contravention of public policy and invalid.

2. There is no doubt of an implied legislative authority allowing a municipal corporation, in supplying water to cities and villages, to fix maximum rates, as well as to adjust and reduce unreasonable and unjust rates. Such power may be implied, without conferring the right to such corporation to fix unalterable rates and charges for long periods of time.

In the case of *Illinois T. and S. Bank vs Arkansas City Water Co., 67 Fed. 196*, a contract for supplying the city of Arkansas City with water, and fixing rates for such supply for a period of 21 years, was, under consideration by the court and it was there held that it would not follow "that the attempt to grant such exclusive privilege for a fixed period of time would render the entire ordinance illegal. On the contrary, all that this Court now decides is, that the city is not bound to accept the service tendered by the water company for any definite and fixed period of time, but under contract made in pursuance of an ordinance legally adopted, the city should be held to pay the stipulated price, so long as it accepts the service offered in pursuance of the contract." The Court further say in the opinion: "The right to furnish water for public and domestic use within a city is a public service, and of such high consequence to the public that it should at all times remain open to the control of the city council for the benefit of the public. The contract here insisted upon would place the matter beyond control of the council for a long period of time. *This is*

in the nature of an attempt to create a monopoly,—a power which the city council never possesses, unless it is delegated in clear, unmistakable terms." Here the Court questions the right to contract for the supply for a term of 21 years. But assuming, and it is not denied, that under the statute of the State of Illinois, cities and villages are authorized to contract for water supply for the period not exceeding 30 years, this case is authority to show how jealously the rights of the public are regarded in this class of service to the public.

The opinion further refers to the burden that the upholding of this contract would impose upon the city and says: "If this claim for hydrant rental for fire hydrants located upon extensions to the original plant, is upheld, it fixes a charge of about $8000.00 annually upon the defendant city. So great a charge upon the revenue of the city must rest upon some well authenticated enactment of the common council of said city, or upon *a binding and subsisting contract*, in which the right, duty, and liabilities of the respective parties are clearly defined and set forth."

So in the case at bar. If the ordinance of June 6, 1882, can be upheld as a contract binding the city of Freeport to a fixed rate for the full period of 30 years, it fixes a charge of $11,680 annually upon the city of Freeport. So before a charge of that magnitude upon the revenues of the city should be upheld, it ought to rest in some well defined delegated power from the legislature of the state to cities and villages to authorize it. As has been heretofore discussed and claimed in this argument, the statute invoked by plaintiff in error, to uphold this power, does not justify it.

In the case of *City of Chicago vs Rumpff, 45 Ill., 90*, the Court in speaking of the powers of municipal corporations, say: "Municipal corporations are only created for the better government and protection of local communities in the enjoyment of their rights, than can be afforded by general law. The powers which they are authorized to exercise, are delegated to them to afford more ample protection to the community in their rights and privileges. Such bodies are never created to enable them to confer pecuniary benefits, or to grant monopolies to any portion of communities, or to individual members thereof. * * * It is believed, that the result of the authorities warrants the assertion that corporate franchises, whether municipal or private, are conferred in trust for the benefit of the entire body of corporators, and must, like all other trusts, be exercised with prudence and discretion. Hence, their by-laws must be reasonable, and such as are vexatious, unequal or oppressive, or are manifestly injurious to the interests of the corporation, are void. And of the same character are all by-laws in restraint of trade, or which necessarily tend to create a monopoly."

In the case of *I. C. R. R. Co. vs People. 95 Ill., 313*, the Court in the opinion rendered in that case say: "The charter of this corporation is, beyond a doubt, a contract, under the adjudged cases in this and other states, by which the corporation acquires the powers and functions to transact such business in the mode prescribed; but it is the opinion of a majority of the Court that all this is, by necessary implication, subject, as all citizens are, to the legislative power of the state to define, prohibit and punish extortion."

Many cases might be cited where charters to corporations, in the nature of contracts, allowing such corporations to fix rates and charges for service rendered to the public, have been held to be subject to subsequent legislative authority to control, regulate, adjust and reduce such rates.

G

1. It is stated, in the argument for plaintiff in error, on page 72, that "numerous cases may be cited in support of the proposition that the contract entered into, under the ordinance of June 6, 1882, is invalid, in so far as it attempts to bind the corporation as to the price of water beyond the term of the then members of the city council." The claim of defendant in error is enlarged beyond its contention, by this statement. The claim in fact is that the ordinance of June 6, 1882, is invalid in so far as it attempts to bind the corporation to the price for water service at fixed, unjust, unfair and unreasonable rates without reference to the duration of the term; and that, by numerous and respectable authority, ordinances and contracts fixing such rates are condemned.

2. It will serve no useful purpose here to collate and comment at length on these cases. For it is as obvious to the members of this Court, as to the legal profession, that these cases on this question are much in conflict, and many of them irreconcilable. But it is not conceded, as counsel for plaintiff in error contend in argument, that "these cases will show that the doctrine contended for by us is the correct one."

In the case of *Trustees vs City of Jacksonville*, 61

Ill., (appl) 199, the principle is recognized that a contract, by which a supply of water was to be furnished to appellant for a term of 10 years at a fixed price was held invalid, and that the city had power to change the rates for supplying water from time to time as circumstances might require or justify. The Court, in the opinion say: "If it can be bound by such contract as here set up, it may be bound by another much more difficult of performance, and so it may happen that by reason of improvident contracts, the city may be prevented from performing its duty properly to the great mass of its patrons."

In *Spring Valley Water Works vs Schottler, 110 U. S., 34*, the Court. in speaking in the opinion of a reserved power of alteration and repeal of statutes of the state in relation to charters of incorporated companies, say: "As a corporation, it can contract with the city and county in any way allowed by law, but its powers and obligations, except those which grow out of contracts lawfully made, depend alone on the statute under which it was organized, and such alteration and amendment thereof as may from time to time be made by proper authority. The provisions for fixing rates cannot be separated from the remainder of the statue, *by calling it a contract.* It was a condition attached to the franchise, conferred on any corporation formed under the statute, and indissolubly connected with the reserved power of alteration and repeal." Again, "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full con-

sideration in *Munn vs Illinois, 94 U. S., 113.* As was said in that case, *such regulations do not deprive a person of his property without due process of law.*"

The validity of an ordinance, in the nature of a contract entered into by the city with a private corporation, for a supply of gas at a fixed price for the period of thirty years, was under consideration in the case of *E. St. Louis vs E. St. Louis L. G. Co., 98 Ill., 415,* an objection was made to the validity of the ordinance on the ground that it tied up the legislative powers of the city in providing for a supply of gas for a long term.

The Court in the majority opinion intimates that the contract providing for the fixing of rates for that period of time might be objectionable; but that in so far as the contract had been executed by the city, it was liable for gas which had been furnished under it at the contract price. The Court, in the opinion, say: "It is enough for the obviating of any such objection that there be the right at any time to avoid the contract, so that there may be the freedom to exercise its governmental power in regard to the subject, when and as the city pleases. So far as the contract has been performed, by furnishing light to the city, without its disaffirmance of the contract, it may be treated as if it had been a single contract for the furnishing of the light for the months in question alone, and one fully completed."

Justice Walker wrote a dissenting opinion in this case, holding the contract unconstitutional. In this opinion the powers of municipal corporations in such cases is discussed at length, with great learning and ability.

This ordinance, or contract, afterwards became the subject of much litigation, both in the Appellate and Supreme courts of the State of Illinois. The controversy finally ended with the case of *E. St. L. Co., for use of Griswold vs City of E. St. Louis, 47 Ill. (Appl.), 411.* The Court in the opinion in that case say: "The separate dissenting opinion of Justice Walker demonstrates, by a clear and conclusive reason, that as an executory contract, this contract of Oct. 4, 1874, is invalid and void, and, as we think, nothing said in the principal opinion contraverts such expression, but, on the contrary, it is there conceded that the city could at any time avoid this contract."

III

A

This ordinance of the city of Freeport, passed Feb. 10, 1896, is not in violation of the provisions of Sec. 10, Art. 1, of the Constitution of the United States, if the ordinance is within the scope of the police powers of the municipality, or, if in its passage, the corporation was exercising that inherent power of sovereignty, resting in all legislative bodies, to protect the welfare of the public against *injustice and oppression.*

In the case of *N. Y. & N. E. R. R. Co. vs Bristol, 151 U. S. 556,* Chief Justice Fuller states the rule to be, on this branch of the case at bar, as follows: "It is likewise thoroughly established in this Court, that the inhibition of the constitution of the United States, upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the law by the state, are not

violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. * * * The conclusions of this Court have been repeatedly announced, to the effect that railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression."

In the case of *Hawthorn vs the People, 109 Ill, on page 311*, the Court, in construing a statute, claimed to be in derogation of the common law and as not falling within the scope of the police power of the state, said: "It is claimed that this statute is not a police regulation. That may be true, if the term were confined merely to the protection of the *health and morals* of the people. The term has a much more comprehensive meaning. It has been defined to be: 'The regulation and government of a county or city, so far as it regards its inhabitants.' Also, 'The laws, ordinances and other measures which require the citizens to exercise their rights in a particular form.' It is true there are other and more limited meanings of the word, and when it is said that there are other limits to its exercise than the constitution, it has reference to the more restricted mean-

ing of the term. When exercised by the legislature, in its more comprehensive sense, in the passage of laws for the protection of life, liberty and property, or laws for the general welfare, the only limitation to restrain its action must be found in the constitution. This, in the larger sense, is an exercise of the police power by the General Assembly, and falls fully within legislative powers, and sustains the enactment under consideration."

It will undoubtedly be claimed that the powers above mentioned, in some of the cases cited, did not relate strictly to the police power now being considered. Police powers, as we have seen, have no precise limitation or restriction, but extend to all matters effecting the public welfare, and are called into use as the necessities of each particular case may arise.

2. It is insisted by counsel for plaintiff in error that the enforcement of said ordinance, by the city of Freeport, will deprive their client of his property without due process of law. To have this effect, in a legal sense, it must deprive it of some right or interest in property rights which the law should protect. This question, again, brings up for consideration the character of the plaintiff in error's business, with reference to its relation to a public use. As bearing upon that question, and what constitues the taking of property without due process of law, the case of *Budd vs People of New York, 143 U. S., 517*, has, among other cases, been cited in the brief of this argument.

The case was brought to this court on writ of error to the Court of Appeals of the state of New York. The

opinion of the court below will be found in the *22 N. E. Rep. 670.* The case in both courts received marked consideration, and the opinions rendered by those courts are exhaustive and instructive, and apply in a large extent to the questions involved in this case. While the case relates to the privileges and duties of private persons engaged in the business of conducting elevators, and other classes of business impressed with a public use, these opinions cover much that is in point here. The opinion given in the Court of Appeals holds: "The control which by common law, and by statute, is exercised over common carriers is conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property does not in every case depend upon the question of legal monopoly. From the earliest period of the common law, it has been held that common carriers were bound to carry for a reasonable compensation. They were not at liberty to charge whatever sum they pleased, and even where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforcible beyond the point of *reasonable compensation.*

* * * The underlying principle is, that business of certain kinds holds such a peculiar relation to the public interest, that there is superinduced upon it the right of public regulation. We rest the power of the legislature to control and regulate elevator charges on the nature and extent of the business, *the existence of a virtual monopoly*, the benefit derived from the canal, creating the business and making it possible, the interest of trade and commerce, the relation of the business to the prosperity and welfare of the state, and the practice

of legislation in analagous cases. These circumstances collectively create an exceptional case and justify legislative regulation. * * * There is little reason under our system of government for placing a close and narrow interpretation on the police power, or in restricting its scope so as to hamper the legislative power in dealing with the very necessities of society, and the new circumstances as they arise, calling for legislative intervention in the public interest." This opinion rendered in the Court of Appeals was affirmed by this Court in the case of *Budd vs New York, Supra.*

When the case was before this court, there was an attempt to overthrow the authority of the case of *Munn vs People.* That case, with others, cited in the opinion supporting it, were reviewed, and the principles of the case of Munn affirmed, and the act of the state of New York then under consideration sustained. The Court, in the opinion, say: "We are of the opinion that the Act of the legislature of New York is not contrary to the 14th amendment to the Constitution of the United States, and does not deprive the citizen of his property without due process of law; that the Act, in fixing the maximum charges which it specifies, is not unconstitutional, nor is it so in limiting the charge for shovelling to the actual cost thereof; and *that it is a proper exercise of the police power of the State.*"

That the ordinance of June 6, 1882, creates a monopoly cannot be successfully denied. It was intended to effect that pnrpose. It, so far as words go, makes the grant exclusive. The city of Freeport is obligated by it to pay for this hydrant rental, even

should it refuse the service, and if the ordinance be valid, to pay the price fixed by the ordinance for the 30 years term. It cannot purchase the works before the end of that term, and then if not in a situation to purchase, the monopoly is continued by this contract for a further term of 25 years.

If the exclusive privilege clause of the ordinance is invalid, it does not relieve the city from paying these rentals. The monopoly so created and protected is extortionate, *to the extent of more than one-half of the fixed price.* It is admitted by the record that the rates so fixed are *unfair, unjust, unreasonable and oppressive.*

3. It is claimed on the part of the plaintiff in error that the act of June 6, 1891, is invalid, for the further reason, that the act provides that the city council is made the tribunal to sit in its own case, in determining what are reasonable rates; and further, that establishing rates is a legislative and not a judicial act. But little space in this argument will be devoted to this contention. It is admitted all through the argument for plaintiff in error, that the power to fix rates *was delegated by the water works acts to the City Council to determine and fix rates by ordinance.* On the other point of the contention, it has been a usual mode adopted by the legislature to confer upon agents, appointed by its authority, to establish and fix reasonable rates and charges in the performance of a public service.

This question was under consideration in the case of *C. B. & Q. R. R. Co. vs Jones, 149 Ill., 361,* where many cases, decided in both the state and federal courts are cited and discussed, which furnish an exhaustive

brief against this contention of plaintiff in error. The Court in the opinion say: "When a board is authorized to make a schedule of rates, and the schedule is merely given the force and effect of *prima facie* evidence, as to the reasonableness of the rate, in a suit involving the question of such reasonableness, there is no delegation to the board of the legislative power to establish rates. The legislature thereby merely refrains from the exercise of its constitutional power, and, by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject. The final tribunal of arbitrament is not the judiciary, but the legislature. But, when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there; *then resort may be had to the courts to inquire judicially whether the charges are reasonable*" *(116 U. S., page 462)*."

Nor does the Act in question deprive the plaintiff in error of the right of trial by jury. In the case last above cited, it was contended that the statute then under consideration, in providing that commissioners should make a schedule of rates, which should be *prima facie* evidence of reasonableness, infringed upon the right of trial by jury. But the Court in the opinion say: "We do not think that this objection should be sustained. In the first place, the act does not deprive the railroad corporations of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of

the acts of the commissioners in fixing the rates of charges. In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence. (*2 Rice on Evidence, pages 606, 807; Commonwealth vs Williams, 6 Gray, 1; State vs Hurley, 54 Me. 562*). *Such provisions are not unusual.*"

In the case of *N. Y. & N. E. R. R. Co. vs Bristol 151 U. S. 556*, the Court, in speaking of the power of the legislature to delegate its authority to fix reasonable rates in such cases, say: "The state has power to exercise its control through Boards of Commissioners; there is no unjust discrimination, and no denial, of the equal protection of the law in regulations applicable to all railroad corporations alike, nor is there necessarily such denial, nor an infringement of the obligation of a contract in the imposition upon them, in particular instances, of the entire expense of the performance of the acts required in the public interests, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law by statute under which the result is ascertained in a mode *suited to the nature of the case and not merely arbitrary and capricious.*"

In the case of the *City of Danville vs Danville Water Co. 178 Ill. 299*, the Court in speaking of the the act of June 6, 1891, say: "We are of the opinion that the act was not an invalid and unconstitutional law, and that the legislature had the right to confer the power to fix maximum rates upon cities, in which private corporations had already been authorized to supply water, as well as cities which were to be so authorized

after the passage of the act. It follows, that the ordinance of Jan. 17, 1895, was a valid ordinance. It is to be remembered that the amount which the company seeks to recover in this suit, is for water furnished after the ordinance of Jan. 17. 1895, was passed, and after the company received notice provided for in that ordinance."

It will be observed that in the case at bar, the action is brought to recover for water rates furnished the city of Freeport since the passage of the ordinance, here in question, of Feb. 10, 1896; the city having paid for water so furnished, in full to that date, and is brought, after notice to the company, that only reasonable rates for the supply thereafter would be paid.

4. Regulations of trade may more or less impair the value of property, but unless they virtually take away and destroy those rights in which property consists, they do not come within any constitutional inhibition. Besides, such destruction, for all substantial purposes, must be total. This rule was declared in the case of *Munn vs People, 69 Ill., on page 89.*

The court in the opinion rendered in that case, further say: "No person can claim that, in the exercise of the proper function of government, his property shall not be diminished in value. The point is, the owner shall not be deprived of his property without due process of law. If, in the exercise of any one of the admitted functions of government, a person's property is rendered less valuable, can it be seriously claimed this provision in the Bill of Rights has been infringed?" In the case at bar, the position of defendant in error is aptly stated in this opinion: "By the law under consideration

no right of property is taken away or destroyed. All the property the owners ever possessed in this business remains to them untouched by the strong hand of legislative power."

The only ground upon which plaintiff in error rests its claim that its property, by this statute and ordinance, is to be taken or damaged without due process of law is, that its profit and income will thereby be diminished. In the Munn case, the same point was urged, by counsel, upon the attention of the Court. In passing upon this claim the Court say: "*Anticipated profits* are not and cannot be held and regulated as property in the ownership or possession of him who owns the article out of which profits are expected to flow. The property is one thing and remains untouched—the profits are not *in esse* and cannot be claimed as property. When it is said one is deprived of his property, the understanding is, it has been taken away from him—he is divested of title and possession. This provision in the bill of rights has never been so construed by the courts of any state, whose constitution has such a provision, as to deny to the legislature the power to make all needful rules and regulations respecting the use and enjoyment of property."

B

The irrevocable grant of special privileges to persons or corporations by section 14, article 2, of the constitution of the state of Illinois, of 1870, is a denial of the power to municipalities to fix unalterable rates and charges for furnishing water to such municipalities.

The plaintiff in error, here, is claiming an *exclusive and special privilege*, to furnish water to the city of

Freeport and its inhabitants, by an irrevocable contract, at fixed rates and time for water service. Under this contract it is insisted that while the *exclusive provision* thereof may not be maintainable, yet, that the contract is invoilable in its other provisions, the effect of which are, to bind the city from contracting with any other person or corporation for supplying water, and to charge the rates for hydrant service mentioned in the contract for the period of thirty years.

C

The contract is further avoidable, as to the rates to be paid for water service for that length of time, and by Sec. 1, Art. 10, Chap. 24, of the revised statutes not enforceable, for reasons which have hereinbefore been stated.

This contract is further subject, as to future service for water supplied the city, to the ordinance of February 10, 1896, enacted in pursuance of the act of June 6, 1891. It is claimed, however, by plaintiff in error that this act is invalid because the legislature could not rightfully enact the law so as to affect any right or interest of plaintiff in error secured by the said so-called contract. This contention, in some measure, depends upon the construction of Sec. 9, Chap. 32, of the statute of the state of Illinois relating to corporations. That section of the statute was under consideration and fully discussed in the late water works cases decided by the Supreme Court of that state.

In the *Danville case*, *Supra*, the Court say: "The Danville Water Company was organized under the general Incorporation act of this state, approved April 18,

1872, in force July 1, 1872. The charter of a corporation, formed under the general Incorporation act, does not consist of its articles of association alone, but of such articles taken in connection with the law under which the organization takes place. The provisions of the law enter into and form a part of the charter (*People ex rel vs Chicago Gas Trust Co. 130 Ills. 268.*) Therefore, the provisions of the general Incorporation act must be regarded as entering into, and forming a part of, the charter of the defendant in error. Section 9 of the general Incorporation act provides that: 'The General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act.' (*1 Starr & Curt. Ann. Sta.—2d ed.—p. 1006*).

By organizing under the general Incorporation act, the defendant in error agreed to submit itself to and to be bound by such regulations and provisions as the legislature should deem it advisable to make. The object of its creation was to furnish water to the city of Danville and the inhabitants thereof. The right of the legislature to regulate and provide for the rates, at which such water should be supplied, *was a right reserved by section 9.* The language of section 9 is different from, *and broader in its scope than*, the language contained in many charters, which reserve to the state the power to repeal, alter, amend or modify the charter itself. We apprehend, therefore, that the decisions restricting the power of the state as to charters which are given subject to the right of the

state to repeal, alter, amend or modify them do not apply to *such broad language as is used in section 9.* By the terms of section 9 it is something more than the mere right to change the charter of the corporation, which is reserved to the legislature. The authority is thereby reserved to provide the regulations and provisions, under which the corporation may proceed in the transaction of its business. We have held that the legislature may impose duties on corporations the same as on individuals in the absence of special enactments. We have also held, that the constitution of 1848 by implication reserved to the legislature the right to change or increase the liability of a shareholder in a corporation. *(Illinois Central Railroad Co. vs City of Bloomington, 76 Ill., 447; Weidenger vs Spruance, 101 id., 278; Diversey vs Smith, 103 id., 378; Arenz vs Weir, 89 id.. 25; Buttler vs Walker, 80 id., 345.)*."

A lengthy quotation has been made from this opinion, because it presents the question in a more concise statement than any argument made could present it. In the Danville case, the city by an ordinance had contracted to pay $75.00 as the annual fixed rent for hydants, to the water corporation for the term of 30 years. By mutual concession these rentals had been reduced so that at the time of the commencement of the action, rental charges had been reduced from $40.00 to $50.00 per hydrant per annum.

The opinion in that case also discusses and determines against the contention of plaintiff in error, that the provisions of said statute of 1872, were broader in its scope than similar statutes of other states restricting legislative control over corporations organized under

general laws. Thus several pages of the argument for plaintiff in error is replied to by making said quotation.

2. When a legislature delegates powers to a municipal corporation as a tribunal, as an agent of the law, such tribunal or agent can establish only *reasonable* rates. It is stated in the first special plea of the defendant in error, and admitted by the demurrer, that the rates, when and as fixed and established by the ordinance of June 6, 1882, were unjust, unfair and unreasonable.

If so, the city of Freeport as we have seen, if the contention of the plaintiff in error is correct, would be required under this ordinance to pay these unreasonable rates for a water supply, according to the price and for the term fixed in this ordinance. It is here contended, however, that by the notice given to the plaintiff in error by the city council, and by the provisions of the ordinance of Feb. 10, 1896, such unreasonable rates were suspended, and that the rates fixed in the latter ordinance, which are by the demurrer admitted to be just and reasonable, are substituted therefor, and that the defendant in error's liability for water supply thereafter is governed by the amended ordinance.

The legislature of the State of Illinois, by the act of June 6, 1891, has provided that, "in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same same be reviewed and determined by the Circuit Court of the county in which such city, town or village may be."

In the case of *Rogers Park Water Co. vs Fergus, 178 Ill. 571*, it was contended there, as it is here, that

this tribunal, to determine what were reasonable rates and charges, is not a lawful tribunal to act in such case. The Court in the opinion, however, say: "Nor are the corporations left without remedy against unwarranted and unjustifiable acts of the municipal council. If the scale of rates established by a city council is deemed by the corporation to be unreasonably low and unjust, it is expressly provided the action of the council may be reviewed and determined by the Court, on application of the corporation."

In the case of *San Diego Water Co. vs City of San Diego, 50 Pafc. Rep. 633*, the city council of that city, under authority of the legislature, proceeded to fix water rates for a supply of water to the city, and it was claimed that such rates, fixed by an ordinance of the city council under that authority, were unreasonable. The Court in the opinion sustain the validity of such legislative authority to empower the city council to act thereunder and hold, "if the city council has fixed rates so palpably unreasonable and unjust as to amount to a taking of plaintiff's property without just compensation, it has so far exceeded the powers conferred upon it, and the Court is competent to afford redress."

It was there contended that the city council, having acted without notice of its intention to change such water rates, and the corporation not having appeared to act in the fixing of such rates, the action of the council was invalid, although the ordinance did not provide that the corporation should have notice. The Court seems to have given some weight to this contention, although the case was not determined upon that point.

Here, however, the special pleas of the defendant in error set up that the plaintiff in error *was notified*, and that efforts were made to *induce it to meet and confer with the city council*, with a view of fixing and adjusting such reasonable rates, but that the water company refused such offer. That, thereupon, the city council itself proceeded to fix, determine and ordain such reasonable rates, and that the rates so fixed by the said ordinance are *just, fair and reasonable.*

Yet, if the plaintiff in error now considers the rates so fixed by the city council unfair and unreasonable, it may apply to the court for a hearing upon that question, and in such case, a jury is allowable, there is no denial in the act of the right of trial by jury.

IV

No attempt will be made here to go through the brief and argument made for the plaintiff in error, to analyze the numerous cases there cited, or to show their application or irrelevancy to the questions involved in this case. It will not be claimed, on the part of the defendant in error, that all the cases cited to support its contentions made in this brief, in their facts, or conclusion, are an exact parallel of the case at bar.

An examination of the brief for plaintiff in error reveals the fact that many of the cases therein cited have no, or but little, relevancy to the issues in controversy here. A few of the cases, to which much prominence is given by counsel for plaintiff in error, will be briefly noticed.

The main proposition relied upon to sustain the case of the plaintiff in error is, that the contract claim-

ed by the ordinance of June 6, 1882, authorizes and legitimatizes the right of the water company to continue the rates and charges for water service therein fixed for the full period of 30 years. Further, if it does not, then under an implied power arising from the statute in question, the power is conferred, and the ordinance or contract is thus made valid.

These contentions, if untenable, are fatal to the claim of the plaintiff in error. To the contention of the defendant in error, that, even though the contract be authorized in either of the modes above stated, the contract is obnoxious, as an invasion of the police power, it is replied that the act of Feb. 10, 1896, was not passed, nor can it be sustained, under what is termed a reserved police power. It is stated in the brief, "that this question is no longer an open one in this court."

To sustain this positive assertion is cited the case of *Walla Walla vs Walla Walla Water Co. 172 U. S.* which is mainly relied upon. To understand the force and binding character of a judicial decision, it is of the first importance to learn what facts and what legal principles were involved in the case. It seems that the issue made in that case, and raised upon the *answer* of the defendants was: "That the contract of the city with the plaintiff was not a valid and binding contract, so far as concerned the stipulation binding the city not to erect or maintain, or become interested in, any system of water works other than that of the plaintiff."

The Court in the opinion say: "As the contract in question was expressly limited to 25 years, and as no attempt was made to *grant an exclusive privilege* to the

water company, the city seems to have acted within the strictest limitation of the charter. *Atlantic City Water Works vs Atlantic City, 48 N. J. Law, 378; had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect.*"

The Court again say: "There was no attempt made to create a monopoly, by granting an exclusive right to this company, and the agreement that the city would not erect water works of its own, was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn, and pay for the water works of the company at any time during the existence of the contract. Taking sections 7 and 8 together they amount simply to this; that, if the city should desire to establish water works of its own, it could do so by condemning the property of the company, and making such changes in its plant, or such additions thereto, as it might deem desirable for the better supply of its inhabitants, but that it would not enter into a direct competition with the company during the life of the contract."

It is true that the Court, in the opinion, held that the contract there under consideration was valid, and what was said in reference to the police power must be considered as applying to the case then under consideration. But it will be seen that the case in its important and controlling features, is not analagous to the case at bar. For here, *the exclusive privileges* of the contract *tend to create a monopoly* by tying up the hands of the city by an exclusive contract, as to price and duration

of the term for 30 years, with no authority given to the city to erect water works for itself, to purchase the plant, or to authorize any other person or corporation to supply the city with water covering that period.

The case of *Los Angeles vs Los Angeles City Water Company, 177 U. S., 558*, has very little if any bearing upon the questions involved in the case at bar. The ordinance therein questioned was passed in pursuance of the provisions of the constitution of the state of California, adopted in 1879, in relation to "water and water rights," which provided in substance, section 1, that the rates or compensation for the use of water supplied to any city, county or town, or the inhabitants thereof, should be *fixed annually* by the board of supervisors or the municipal authorities, in the same manner as other ordinances and resolutions are passed, and should *continue in force one year and no longer.* That in pursuance of said constitutional provision, the electors of the city of Los Angeles ratified and adopted a charter, and the ordinance there under consideration was passed pursuant to the foregoing *constitutional and statutory provisions.* Afterwards, on October 19, 1896, the city of Los Angeles adopted a resolution, requiring the water company to pay to the city an amount of money equal to 40 per cent of the gross rates received by said company from the consumer of water, as rental for all water taken by said company from the Los Angeles river during a certain period of time.

It further appears from the statement of the case that the city had leased to certain parties the water works in question, which had been constructed by the city, for a term of 30 years, with the right to lay pipes

in the streets, and sell and distribute the water for domestic purposes, as also the right to take water from the Los Angeles river to a limited amount. This lease was assigned to the water company, which was organized for the purpose of supplying the city of Los Angeles with water under its provision. It further appears that in the year 1870 the legislature, by an act then passed, ratified all of the acts, ordinances and agreements so made in reference to the furnishing of water. The Court, in the opinion, reviewed all of these acts, ordinances and contracts, and summed up a conclusion thereon, as follows: "We are not concerned, however, to reconcile the cases decided since 1870, and we have only mentioned them to present fully the contention of appellant. The cases prior to that time, as we have seen, made the obligation of the contract of 1868, and determined the power of the legislature to ratify it. And there seems to have been no question of this power. Besides, *legislative recognition*, *besides recognition by many acts of the city*, the contract has received judicial recognition."

It is needless to say that there is nothing shown there in common with the case at bar. There was no question of the right to fix unalterable rates and charges, for long period of time, in fact the law made it obligatory upon the authorities to fix annual rates for water service. Nor are there any exclusive privileges secured to the water company, like unto those contained in the contract under consideration, in the case at bar.

The New Orleans cases are frequently cited as, supposedly, sustaining the contention of counsel for plaintiff in error, in their definition of the term "police pow-

er." From an examination of those cases it will be seen that the questions involved, in those cases, was whether or not the legislature of the State of Louisiana could grant exclusive privileges to cities or villages for providing a supply of gas or water for public use. It was held by the Court, in those cases, that such grants under the constitution and laws of that state were binding. None of those cases touch upon the question here involved, but related entirely to the time limit, of making a contract for *an exclusive privilege*, for supplying water. The question of rates does not seem to have been involved.

The Court in the case of *New Orleans Water Co. vs Rivers, 115 U. S. 674*, cite from the opinion in the case of *New Orleans Gas Light Co. vs Lou. L. Co. 115 U. S. 650*, as follows: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect *the public health*, the *public morals or public safety*, as the one or the other may be involved in the execution of such contract. Rights and privileges arising from contracts with a state are subject to regulation for the protection of the public health, the public morals and the public safety in the same sense as are all contracts, and all property, whether owned by natural persons or corporations."

The case of *St. Tammany Water Co. vs New Orleans W. Co. 120 U. S. 63*, is but an affirmance of the law of the Rivers case, *Supra*. These cases practically decide that where an express, or exclusive grant is made to an individual or corporation, for the exercise of a business of a purely private nature, it is valid. They do not decide

that when such business is of a *public character* relating to the welfare of the community, or *is impressed with a public service*, invoking the application of those natural laws, which from time to time operate upon and affect the cost of supply, and the price thereof, that such grants are valid. It must also be remembered that those cases refer to, and support, the grant of *an exclusive privilege as to the duratisn of the time of maintaining water works, but not as to fixed rates for that length of time for the service.*

The water works cases decided by the Supreme Court of the state of Illinois, and now pending in this Court, and which are, by the orders made in these cases, to be considered together by this Court, will doubtless receive due consideration. It is believed that these cases cover all of the questious material to a proper determination thereof, and are founded upon principle and authority. Counsel for plaintiff in error refer approvingly to the dissenting opinion of Justice Phillips, in the Danville case. It will be noticed that the Freeport case, the one now under consideration, was decided and the opinion of the court below affirmed by a unanimous Court.

The cases cited in the dissenting opinion by Justice Phillips, as will be seen from their examination, relate to *exclusive rights and privileges*, but in no one of these cases is found the vital questions involved here—the fixing of unalterable rates for an unreasonable length of time.

The act of June 6, 1891, is not invalid by reason of any repugnancy to the constitutional provision relating to the impairment of contracts. *Douglas vs State*

of Kentucky, 168 U. S., 488; Ford vs Chicago Milk Shippers' Assn., 155 Ill, 166; Munn vs People, 69 Ill., 80; Cooley, Const. Lim. 436.

V

There are some inaccuracies made in the statements of counsel for plaintiff in error in their argument to which the attention of the Court will be briefly called. The fourteenth amendment to the constitution of the United States has *not* enlarged the meaning of the term "due process of law," beyond the provision as found in the original constitution on that subject. *Cooley on Const. Lim.,437-438; Howes vs Grush, 131 Mass., 207.*

On page 70 of the argument of plaintiff in error, it is stated that the legislature of the state of Illinois, by two special acts, "have especially empowered cities and villages to make a contract for water at fixed rates by ordinance, and for a period of 30 years." This is an inadvertant statement, doubtless, of a fact not justified by an investigation of the statutes.

It is stated by counsel for plaintiff in error, in their argument, page 75, that "there is no allegation in the plea that the plaintiff in error knew, when it accepted its ordinance, that the rates were unreasonable." It is, however, stated in the pleas that they were in fact unreasonable, and so remained, up and until the passage of the ordinance of Feb, 10, 1896, and that, prior to the passage of such ordinance, the water company was informed that such rates were unreasonable and were invited to act with the city council to adjust reasonable rates, but that the water company declined so to

do. Nor can it be successfully urged that because the corporation has submitted to the payment of such unreasonable rates for a number of years, that they are estopped from now questioning their unreasonableness. If the contract was invalid in its inception, for want of authority in the city council to execute it, acquiescence will not estop the city from now urging the want of power to make it. This question has been repeatedly determined against the contention of the plaintiff in error, notably in the case of *E. St. Louis vs E. St. Louis G. L. Co. 98 Ill. 415*, and other cases predicated thereon.

It is true that, by the assignment by Shelton of the contract, there was conferred upon the assignee all rights under it which the assignor might exercise. But the company's assignee would not have more enlarged right than the assignor. This water company was organized to supply water to the city of Freeport under this contract. It will be charged with notice of all want of power in the city council to authorize it, and as a corporation, in the exercise and carrying out of its provisions, will be subject to the same legislative restrictions as are imposed upon other corporations organized under the general law of the state.

VI

It is further submitted, that by the decisions in the water works cases in the Supreme Court of the State of Illinois the act of June 6, 1891, is held to be constitutional; that it is not objectionable to any constitutional provisions of the United States, or of the State of Illinois; that the ordinance of June 6, 1882, was invalid

in certain particulars; that the city had no power to make a contract to pay fixed and unalterable rates for 30 years, and that the language of the water-works act of April 10, 1872, does not necessarily imply the power to make a fixed rate. That while the supply could be contracted for for the entire term, the price should be determined from time to time and rates be settled by the rules of the common law.

It is further here insisted, that the contract, as made, is an infringement upon the rights of sovereignty, which, by the common law, is invested in all legislative bodies in dealing with public rights and privileges, and that the contract is an invasion of the police powers vested in municipalities, so far as it attempts to fix unalerable rates, and is therefore invalid.

In the case of *N. Y. & N. E. R. R. Co. vs Bristol, on page 412*, in speaking of the laws and regulations applicable to corporations when exercising police powers, and the adjudication of the State Courts regarding them, the Court say: "That the adjudication of the highest Court of a state, that, in such particular, a law enacted in the exercise of the police power of the state is valid, will not be reversed by this Court on the ground of an infraction of the constitution of the United States. *Railway Co. vs Alabama, 128 U. S., 96; 9 Sup. Ct., 28; Banking Co. vs Smith, 128 U. S., 174; 9 Sup. Ct. 47; Railway Co. vs Beckwith, 129 U. S., 26; 9 Sup. Ct., 207; Dent vs West Virginia, 129 U. S. 114, 9 Sup. Ct. 231; Railroad Co. vs Gibbes, 142 U. S. 386, 12 Sup. Ct. 255; Railroad Co. vs Emmons, 149 U. S. 364, 13 Sup. Ct. 870.*"

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The time for the preparation of the argument for the defendant in error has been limited. In the time allotted it has been found impossible to go through and thoroughly digest the almost numberless cases cited and referred to in the brief and argument for plaintiff in error, nor to, in detail, make reference to the many points urged therein. But it is believed that the material and controlling facts in this case have been mentioned and considered, and that in this presentation of them the Court may find reason to approve and sustain the positions so taken, and affirm the judgment of the Supreme Court of the state of Illinois.

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